IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21906

TED DAVID HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Eastern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [TR 27].[1]

1. TR refers to the Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [TR 26].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [TR 1].

Appellant pleaded "not guilty" and was tried by the Honorable M. D. Crocker, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [TR 27].

A trial brief on behalf of defendant was filed during the trial [TR 13].

The appellant was found guilty [CT 27].[2]

FACTS

Appellant presented two sets of facts that require our consideration:

A.

Appellant declared, at the earliest opportunity, to his conscientious objection to war. This was on his Classification Questionnaire, page 7.[3]

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2. CT refers to the Clerk's Transcript.
3. Government's Exhibit One.

The local board then sent him SSS Form No. 150, Special Form for Conscientious Objector. He filled it out, and returned it [Ex. p. 12].[3] He made out a prima facie case, by the following answers:

1. He believed in a Supreme Being.
2. He stated this belief was superior to any earthly duty.
3. He "received my religious training from an infant from my mother and father—they taught me at home through home bible study and took me to public bible studies."
4. He relied "mostly to my mother for help in understanding the bible. She lives at Parker, Arizona, Rt. 1, Box 35-A."
5. He said "I believe in force, only in the event my life has been attempted, and then I would try to only injure and not kill."
6. He believes "the action which most describe the extent of my belief is the time I have spent in telling others of my feelings concerning the bible and the power of the creator almighty God."
7. He says "I have repeatedly told many many people of my belief, through public address and oral expression."

He signed at the end, although he neglected to sign on the first page. This was on October 27, 1963 [Ex. 15].

The local board classified him in Class III-A because he had a wife and child, on November 7, 1963 [Ex. 11].

Although the file has evidence that he had expressed a willingness to do the civilian work required of a con-

scientious objector, classified in Class I-O, the local board reclassified him into Class I-A when he informed them that he and his wife had separated. This was on March 5, 1965 [Ex. 11, 16].

B.

He then presented evidence of the dependency of his father and mother [Ex. 29]. He was sent a Dependency Questionnaire, SSS Form No. 118 and he executed it [Ex. 38], giving more detailed evidence. The local board's reply was a form letter, rejecting his claim [Ex. 43] and immediately thereafter he was sent an Order to Report for Induction, SSS Form No. 252 [Ex. 44].

No opportunity was given him, by the board's *summary method* of handling his new evidence, to secure either an Appearance Before Local Board nor an administrative appellate determination. The rejection procedure used by his local board does not permit a request for an Appearance or an appeal [Ex. 11].

QUESTIONS PRESENTED AND HOW RAISED

I.

Was the appellant denied due process of law by the local board's refusal to reopen his classification upon his presentation to the board of new evidence affecting his classification? This was raised by the defendant during trial and argument.

II.

Was the denial of administrative appellate opportunity arbitrary, unjust and prejudicial to the appellant? This was raised as above.

III.

Was there a basis in fact for rejecting the classification claims of the appellant? This question was raised by the defendant during trial and argument.

SPECIFICATION OF ERRORS

I.

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

1. Appellant presented a prima facie case in two instances and the local board should have reopened.

By not reopening, and giving him no hearing whatever he was treated unfairly and contrary to the letter and spirit of the regulations:

Dickinson v. *United States,* 74 S. Ct. 152 (1953); *Brown* v. *United States,* 9 Cir., 1954, 216 F.2d 258.

2. An incorrect legal basis was used for decision. *Franks* v. *United States,* 9 Cir., 1954, 216 F.2d 266.

ARGUMENT

I

There Was No Basis-in-Fact for Denying the Registrant a Deferred Classification.

Appellant made two claims that were ignored: one for a conscientious objector classification and one for a hardship classification. Why they were ignored will be discussed below, in "B", "A" being devoted to the prima facie quality of these two claims.

A. His prima facie claims.

1. In our FACTS, above, we recited the details of appellant's showing concerning his conscientious objections. These, indubitably, made out a prima facie case.

2. In our FACTS, above, we referred to the details he gave in his Dependency Questionnaire. Here, too, he made out a prima facie deferred classification showing.

It would appear, therefore, that he was entitled either to one of such classifications or to have his claims and evidence handled by the local board according to another of the regulations, that is, the one that (1) gives the local board the right to form an initial, adverse judgment but that (2) preserves the right of the registrant to his subsequent administrative remedies, 32 C.F.R. § 1625.2.

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456 (j)), provides:

"Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ."

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

"1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who

would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The local board's duties and the courts' scope of review in draft cases were spelled out by the United States Supreme Court in *Dickinson* v. *United States*, 74 S. Ct. 152, 157, 158, 346 U.S. 389 (1953):

"The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson puts the proposition more bluntly (74 S. Ct. 152, 159):

". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present case, appellant made out a prima facie case for a I-O classification when he filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast the slightest doubt on appellant's sincerity.

Appellant claimed membership in the Jehovah's Witnesses.

The Court may take judicial notice of the fact that although Jehovah's Witnesses usually have trouble later in the administrative procedure, because of their claim to be ministers, they almost never have trouble getting a I-O classification. There is not a single shred of evidence in the record to cast doubt on appellant's bona fide membership in Jehovah's Witnesses and belief in their creed.

Thus the local board's denial of I-O classification to appellant was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in Dickinson.

The above argument's thrust also applies to his dependency claim, that is, that he met the requirements of the applicable regulations either for a deferred classification or should have been accorded the opportunity to ask for administrative relief. *Miller* v. *United States,* 9 Cir., Dec. 29, 1967, ... F.2d .....

B. Why they were ignored.

Ordinarily, one of Jehovah's Witnesses has had no difficulty in being classified in Class I-O, since 1955. It is almost universally judicially recognized that they have all the qualifications for this classification and that the boards know this. The many reported cases, and a great many of the files of this Court show that Jehovah's Witnesses enter the district court with a I-O classification and opposing an order to report for induction into *civilian work.*

Infrequently, does one of Jehovah's Witnesses have a posture like this appellant. We will discuss these facts in four stages.

(1) Initially, the appellant had a valid claim for a III-A fatherhood, classification and (2) therefore had his conscientious objection claim *correctly* by-passed. This had to be because the law governing this agency provides that a "higher" classification is to be by-passed when the file presents evidence for a "lower" classification, in this instance, III-A. § 1623.2. (3) Then, when the next change of status occurred (the appellant and his wife separated) he was properly deprived of his III-A classification, but the I-O (conscientious objector) claim and evidence in his file should have been considered and was not; (4) when he presented new evidence showing the III-A (hardship to his parents) claim it also should have been considered. By "considered" we mean handled in such a manner that if

the judgment of the local board was against his claims the appellant would still have his administrative opportunities. This, we argue, was a denial of due process.

Miller v. *United States, supra.*

II

The Court Erred in Its Decision of Guilty

The reporter's transcript reveals the legal basis, the standard, used by the trial court, in arriving at its decision:

> "Of course, I think our real problem is that regardless of what was done or what is to be done, the defendant, because of his religious beliefs, can't do anything, he can't accept work in lieu of induction or service in the Armed Forces either one, so any way you go you are going to be in violation of the Selective Service laws." [Rep. Tr. 33]

This standard has already been condemned by this Court in *Franks* v. *United States,* 9 Cir., 1954, 216 F.2d 266:

> . . . "Now, in relation to the I-A-O classification, it must be remembered that the registrant told the local board that he didn't want it anyway, he wouldn't accept it. The local board had before it, 'shall we give him the IV-E now, the I-O, or shall we place him in I-A?'
>
> "The fact that the chairman of the board broached such a classification in questioning Franks, and the fact that Franks made a strong and substantial showing of conscientious objection at least so far as combatant service is concerned, leaves the record open to the interpretation that the board did not consider giving him a I-A-O classification for the reason that he waived and refused it." [269]

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

January 17, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant